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# CANADA AND INVESTMENT TREATY ARBITRATION: THREE PROMINENT ISSUES—ICSID RATIFICATION, CONSTITUENT SUBDIVISIONS, AND HEALTH AND ENVIRONMENTAL REGULATION

*Barry Leon*  
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## INTRODUCTION

The large majority of investor-state disputes arise within the context of Bilateral Investment Treaties (BITs)—known as Foreign Investment Promotion and Protection Agreements (FIPAs) in Canada.<sup>1</sup> BITs provide standards of protection for investors from a treaty state and their investments in another treaty state. They also provide procedural mechanisms for the settlement of disputes through arbitration directly between the investor and the host state. Canada is currently a party to twenty-four FIPAs<sup>2</sup> and four Free Trade

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<sup>1</sup> Investor-State Disputes Arising from Investment Treaties: *A Review*, UNCTAD SERIES ON INTERNATIONAL POLICIES FOR DEVELOPMENT, available at [http://www.unctad.org/en/docs/iteiit20054\\_en.pdf](http://www.unctad.org/en/docs/iteiit20054_en.pdf).

<sup>2</sup> Listing of Canada's Existing FIPAs, FOREIGN AFFAIRS AND INTERNATIONAL TRADE CANADA, available at [http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/fipa-apie/fipa\\_list.aspx?lang=en&menu\\_id=14&view=d](http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/fipa-apie/fipa_list.aspx?lang=en&menu_id=14&view=d) (last modified Sept. 26, 2011). Canada has signed but not yet ratified FIPAs with South Africa, Kuwait and El Salvador. Canada is also negotiating FIPAs with, inter alia, China, India, Tanzania, Mali, and Bahrain. Canada's Foreign Investment Promotion and Protection Agreements (FIPAs): *Canada's FIPA Program*, FOREIGN AFFAIRS AND INTERNATIONAL

Agreements (FTAs) that provide for investor-state arbitration, most notably Chapter Eleven of the North American Free Trade Agreement (NAFTA)<sup>3</sup> between Canada, the United States and Mexico. For ease of reference, both FIPAs and FTAs that include investor-state arbitration will be referred to as Investment Treaty Agreements (ITAs).

This article addresses three issues of particular interest regarding Canada's experience with investor-state arbitration. The first section examines the fact that Canada has not ratified the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (*ICSID Convention*)<sup>4</sup> and is therefore not a member of the International Centre for Settlement of Investment Disputes (ICSID). The second section addresses an issue that Canada faces as a federal state with ITAs. Increasingly, Canada has had to foot the bill for the measures its provinces and territories have taken that have been contrary to Canada's obligations under NAFTA Chapter Eleven. Debate exists over who should ultimately be held to pay for damages awarded through investor-state arbitration in these kinds of cases. The third section looks at how Canada has emerged as a leader in defending investment treaty claims relating to health and environmental protection regulation. Canada has had varied experiences dealing with such claims. However, recent decisions impacting Canada seem to indicate that a state's investment treaty obligations should not impede its ability to regulate in the public interest. This article concludes that, although Canada has room to improve in certain areas related to investment treaty arbitration, the investment treaty system largely works.

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TRADE CANADA, <http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/fipa-apie/index.aspx?view=d> (last modified Sept. 26, 2011).

<sup>3</sup> North American Free Trade Agreement, Dec. 17, U.S.-Can-Mex., 1992, 32 I.L.M. 605, 639-49 (1993) [hereinafter *NAFTA*].

<sup>4</sup> Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, Mar. 18 1965, 17 U.S.T. 1270 [hereinafter *ICSID Convention*], available at <http://treaties.un.org/doc/Publication/UNTS/Volume%20575/volume-575-I-8359-English.pdf>; see also Markus Koehn & Robert Wisner, *The Arbitration Review of the Americas: Canada*, GLOBAL ARBITRATION REVIEW, available at <http://www.globalarbitrationreview.com/reviews/32/sections/115/chapters/1204/canada/>.

## I. CANADA AND THE ICSID CONVENTION

ITAs typically contain the host state's consent to arbitrate and provide the means by which a disputing investor can submit a claim. As investor-state arbitration has evolved, the *ICSID Convention* has established a widely accepted method for the adjudication of investor-state disputes. The *ICSID Convention* was formulated by the World Bank in the 1960s, and has risen to prominence as 147 states have ratified the Convention, while an additional 10—including Canada—have signed but not yet ratified it.<sup>5</sup>

As is made clear in its preamble, the *ICSID Convention* is focused on “the need for international cooperation for economic development, and the role of private international investment” and “the possibility that from time to time disputes may arise in connection with such investment between” a foreign investor and the state in which the foreign investor has invested.<sup>6</sup> The *ICSID Convention* provides a system for investor-state dispute settlement by offering standard clauses, detailed rules of procedure and institutional support, which extends to the selection of arbitrators and to the conduct of arbitration proceedings.<sup>7</sup> Article 25(1) of the *ICSID Convention* states that “[t]he jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre.”<sup>8</sup>

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<sup>5</sup> ICSID, List of Contracting States and Other Signatories of the Convention (May 5, 2011), available at <http://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDDocRH&actionVal=ShowDocument&language=English>. Membership in ICSID is not without controversy as in the last five years both Bolivia (3 November 2007) and Ecuador (7 January 2010) have withdrawn from the Convention. *ICSID Annual Report 2007*, 4 (2007), available at [http://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDPublicationsRH&action=ViewAnnualReports&year=2007\\_Eng](http://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDPublicationsRH&action=ViewAnnualReports&year=2007_Eng); *ICSID Annual Report 2010*, 9 (2010), available at [http://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDPublicationsRH&actionVal=ViewAnnualReports&year=2010\\_Eng](http://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDPublicationsRH&actionVal=ViewAnnualReports&year=2010_Eng).

<sup>6</sup> *ICSID*, *supra* note 4, preamble.

<sup>7</sup> See RUDOLPH DOLZER & CHRISTOPH SCHREUER, PRINCIPLES OF INTERNATIONAL INVESTMENT LAW, at 223 (2008).

<sup>8</sup> *ICSID*, *supra* note 4, art. 25(1).

Perhaps the most distinguishing feature of ICSID is that it provides a binding agreement that Convention members will comply with an arbitral award rendered in a dispute.<sup>9</sup> Each Contracting State to the *ICSID Convention* is required to recognize an ICSID award as binding and equivalent to a judgment of the highest court in their country.<sup>10</sup> Moreover, ICSID awards are not open to appeal and are subject to limited review only by a second ICSID tribunal, known as an ICSID annulment committee, rather than by any country's courts.<sup>11</sup>

ICSID also adopted *Additional Facility Rules* that authorize the ICSID Secretariat to administer certain categories of proceedings between states and nationals of other states that fall outside the scope of the *ICSID Convention*.<sup>12</sup> In particular, the *Additional Facility Rules* cover arbitration proceedings for investment disputes where only one of the parties is a Contracting State to the *ICSID Convention* or a national of a Contracting State. A glaring difference, and disadvantage in the eyes of foreign investors, between the *ICSID Convention* and the *Additional Facility Rules* is that an award rendered under the *Additional Facility Rules* can be subject to review by national courts at the place of enforcement whereas an ICSID tribunal award cannot.<sup>13</sup>

Given that the *ICSID Convention* has achieved such wide acceptance, one would expect that Canada—a G8 and G20 country with the desire to attract foreign investment and with so many businesses and individuals that invest internationally and engage in international projects—would be a party to it. ICSID membership would benefit Canada's international investors and enhance Canada's reputation as a foreign investor-friendly country by giving foreign

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<sup>9</sup> *ICSID*, *supra* note 4, art. 53(1) ("The award shall be binding on the parties and shall not be subject to any appeal or to any other remedy except those provided for in this Convention. Each party shall abide by and comply with the terms of the award except to the extent that enforcement shall have been stayed pursuant to the relevant provisions of this Convention.").

<sup>10</sup> *Id.*

<sup>11</sup> See *ICSID*, *supra* note 4, arts. 50-55.

<sup>12</sup> Schedule C to the Additional Facility Rules sets out the Arbitration (Additional Facility) Rules. The Additional Facility Rules were created by the Administrative Council of ICSID on September 27, 1978. ICSID, *Rules Governing the Additional Facility for the Administration of Proceedings by the Secretariat of the International Centre for the Settlement of Investment Disputes* [hereinafter *Additional Facility Rules*], available at [http://icsid.worldbank.org/ICSID/StaticFiles/facility/AFR\\_English-final.pdf](http://icsid.worldbank.org/ICSID/StaticFiles/facility/AFR_English-final.pdf).

<sup>13</sup> Compare *Additional Facility Rules*, *supra* note 12, arts. 52-57, with *ICSID*, *supra* note 4, arts 50-55.

investors in Canada access to the protections and benefits of ICSID arbitration.

A. CANADA'S INVESTMENT TREATY PRACTICE

Canada's ITAs generally provide that an investor can submit a claim to arbitration under four sets of rules: (i) the ICSID Arbitration Rules; (ii) the ICSID Additional Facility Rules; (iii) the United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules; or, (iv) another body of rules such as the London Court of International Arbitration (LCIA) Arbitration Rules.<sup>14</sup>

Although ICSID arbitration is specified in Canada's ITAs as a potential dispute resolution mechanism, Canada has not ratified the *ICSID Convention*. As a result, both Canadian investors investing abroad and foreign investors in Canada cannot invoke the *ICSID Convention* to govern their arbitration. Canada's reference to the *ICSID Convention* in its ITAs suggests that Canada intends to one day become a member. However, the fact remains that the *ICSID Convention* has been open for signature since 1965 and Canada has yet to ratify the treaty.

This is not to say that there has not been any movement by Canada. On December 15, 2006, Canada signed the *ICSID Convention*, and Canada's federal government passed implementing legislation to ratify the Convention in March 2008.<sup>15</sup> However, the Canadian federal government has yet to issue an order that would implement it. The delay in implementation can largely be attributed to the fact that only four of ten provinces (British Columbia, Newfoundland and Labrador, Ontario, and Saskatchewan) and two of three territories (Nunavut and

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<sup>14</sup> See *NAFTA*, *supra* note 3; Agreement for the Promotion and Protection of Investments, Can.-Thai., art. 13, Sept. 28, 1998, *available at* <http://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/THAILAND-E.PDF>, Agreement for the Promotion and Protection of Investments, Can.-Jordan, art. 27, June 28 2009, <http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/fipa-apie/jordan-agreement-jordanie-accord.aspx?lang=eng&view=d>.

<sup>15</sup> *ICSID*, *supra* note 4.

Northwest Territories) have passed legislation to implement the Convention.<sup>16</sup>

Of the provinces yet to adopt supporting legislation, Alberta and Quebec stand out. The benefits of ICSID membership to these provinces could be significant given the nature of their economies and the international involvement of their companies. Both provinces have vast natural resources including oil and gas, hydro-electric power and forestry. They also have companies in these sectors and in others, such as aerospace and engineering, which are active around the world. As discussed below, Alberta and Quebec have never indicated that they oppose the substance of the Convention, leading some to believe that they are using their resistance to adopt supporting legislation as a means to seek concessions in other areas of federal-provincial relations.

#### B. CANADA'S FEDERALIST STRUCTURE

Before ratifying the *ICSID Convention*, it appears that Canada would prefer to have the support of all of its provinces and territories given Canada's federal structure.<sup>17</sup> As in most federal states, powers are allocated by Canada's constitution between its federal government and its ten provinces and three territories.<sup>18</sup> Canada's constitution allocates treaty-making authority at the federal level.<sup>19</sup> However, when the subject matter of a treaty is in a field in which Canada's provinces

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<sup>16</sup> See Settlement of International Investment Disputes Act, S.B.C. 2006, c. 16 (Can. B.C.); Settlement of International Investment Disputes Act, S.N.L. 2006, c. S-13.3 (Can. N.L.); Settlement of International Disputes Act, S.O. 1999, c. 12, Schedule D (Can. Ont.); Settlement of International Investment Disputes Act, S.S. 2006, c. S-47.2 (Can. Sask.); Settlement of International Investment Disputes Act, S.Nu. 2006, c. 13 (Can. Nun.); Settlement of International Investment Disputes Act, S.N.W.T. 2009, c. 15 (Can. N.W.T.)

<sup>17</sup> See Constitution Act, 1867, 30 & 31 Vict., c. 3 (U.K.), reprinted in R.S.C. 1985, app. II, no. 5 (Can.) [hereinafter *Constitution*].

<sup>18</sup> *Id.* ss. 91 & 92.

<sup>19</sup> The federal government's treaty-making authority is not explicitly conferred under any constitutional provision though is a power that is recognized to have devolved upon it. This stems from Canada's British tradition, where international relations are a prerogative of the Crown, which, in Canada, is exercised by the federal executive branch of the government as the Crown's representative. See LAURA BARNETT, LEGAL LEGIS. AFFAIRS DIV., CANADA'S APPROACH TO THE TREATY MAKING PROCESS (2008), <http://www.parl.gc.ca/Content/LOP/ResearchPublications/prb0845-e.htm>; see also *Capital Cities Commc'ns Inc. v. Canadian Radio-Television Comm'n*, [1978] 2 S.C.R. 141 (Can.).

and territories have authority in accordance with the constitution.<sup>20</sup> the provinces and territories have the power to implement the treaty.<sup>21</sup>

Whether constitutionally, by practice, or as a matter of political pragmatism, the federal government seeks provincial and territorial support when the subject matter of a treaty includes areas that fall within their jurisdiction.<sup>22</sup> Because the *ICSID Convention* relates to areas of provincial and territorial jurisdiction, including “the administration of justice” and “property and civil rights,” provincial and territorial implementing legislation is needed or at least desirable before Canada’s ratification.<sup>23</sup>

This is not the first time Canada has been slow to ratify a treaty relating to international arbitration. Canada took almost thirty years to ratify the *1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention)*.<sup>24</sup> Entered into force in June 1959, the *New York Convention* provides common legislative and judicial standards for the recognition of arbitration agreements as well as standards for the recognition and enforcement of foreign arbitral awards.<sup>25</sup> However, unlike with the *ICSID Convention*, once Canada’s federal government decided to sign the *New York Convention*, it quickly received provincial and territorial support.<sup>26</sup> Canada ratified the *New York Convention* in August 1986.<sup>27</sup>

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<sup>20</sup> See *Constitution*, ss. 91 & 92.

<sup>21</sup> See *Canada (Att’y Gen.) v. Ontario (Att’y Gen.)*, (1937) 1 D.L.R. 673 (Can.) (Labour Conventions Case); see also PETER W. HOGG, Q.C. CONSTITUTIONAL LAW OF CANADA, 11.5 (b), (Carswell, 5th ed. Supp. 2007).

<sup>22</sup> BARNETT, *supra* note 19.

<sup>23</sup> *ICSID*, *supra* note 4 (The *ICSID Convention* addresses issues of arbitral procedure and the recognition and enforcement of arbitral awards, both of which fall within provincial jurisdiction over the administration of justice (ss. 92(14) of the *Constitution Act, 1867*) and property and civil rights (ss. 92(13))).

<sup>24</sup> *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, June 10, 1958, 330 U.N.T.S. 38, (1968) 7 I.L.M. 1046 [hereinafter *New York Convention*], available at [http://www.uncitral.org/uncitral/en/uncitral\\_texts/arbitration/NY\\_Convention.html](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NY_Convention.html)

<sup>25</sup> *Id.*

<sup>26</sup> Edward C. Chiasson, *Canada No Man’s Land No More*, 3 J. INT’L ARB. 67 (1986).

<sup>27</sup> E.g. Edward C. Chiasson & Marc Lalonde, *Recent Canadian Legislation on Arbitration* 2 ARB. INT’L 370 (1986); Chiasson, *supra* note 25.



Given the apparent desire for consensus in ratifying the *ICSID Convention*, the possibility exists that some provinces are using the implementing legislation as a bargaining chip in federal-provincial negotiations with regard to other issues. Another possibility why Canada has not implemented the legislation is that legislative agendas are crowded and seeking consensus in putting forward ratification legislation on an international treaty may simply not be a political priority. Unfortunately, Canadian corporations that invest internationally have done little to press for ratification. Moreover, it may be an unfortunate political reality that treaty ratification is not a “vote-getting” issue.

Regardless of the reasons for the delay, it has never been suggested that concerns about the merits of ICSID is any part of the problem.<sup>28</sup> When Canada’s House of Commons considered ratification legislation, Members of Parliament, from all parties and regions, generally agreed that ratification is in Canada’s interest.<sup>29</sup> Indeed, in the many years since ICSID came into existence, irrespective of the governing political party at any point in time, Canada’s federal government has been trying to get the provincial and territorial governments to not only commit to act, but to actually act.<sup>30</sup>

### C. MOVING WITHOUT FULL SUPPORT?

Some signs indicate that Canada’s federal government might move to ratify the Convention despite the lack of implementing legislation in all of its provinces and territories. One indication came during parliamentary debates and hearings when Parliament was considering

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<sup>28</sup> Some commentators have raised the issue that ratification of the ICSID Convention deserves thoughtful consideration given the limited possibilities for review of ICSID awards. At the moment, all arbitral awards against Canada can be challenged before domestic courts where public policy considerations can be taken into account. An award made by an ICSID tribunal, however, can only be challenged in annulment proceedings before a tribunal internally appointed by ICSID on very narrow grounds. See generally J. Anthony Vanduzer & Anthony R. Daimsis, *A Closer Look at Canada’s Imminent Accession to the ICSID Convention*, 35 CAN. COUNCIL ON INT’L. L. BULLETIN (ELECTRONIC) (2009), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1474319](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1474319).

<sup>29</sup> Canada. Parliament. House of Commons. *Debates*, 39<sup>th</sup> Parliament, 1<sup>st</sup> Session, vol. 141, issue 154, May 15, 2007, available at <http://www.parl.gc.ca/HousePublications/Publication.aspx?DocId=2945948&Language=E&Mode=1&Parl=39&Ses=1>.

<sup>30</sup> *Id.*

federal implementing legislation.<sup>31</sup> Parliamentarians and officials stated that Canada could designate the provinces and territories that wish to be party to ICSID as “constituent subdivisions” in accordance with the Convention’s “federal clause.”<sup>32</sup> Article 70 of the *ICSID Convention* would allow Canada to identify, by written notice, the provinces and territories to which the treaty would not apply.<sup>33</sup> These provinces and territories would eventually be able to join once they pass their own implementing legislation.<sup>34</sup>

This approach, however, is not without dissent. Some opposition members in the federal Parliament maintained that the “constituent subdivision” approach would violate Canada’s constitutional division of powers and would constitute a “wrongful abrogation” of the federal government’s control over international relations.<sup>35</sup> A definitive constitutional position on the part of the federal government, if it has one, has not been made public.

Another argument against this approach is that by ratifying the *ICSID Convention* without implementing legislation in all provinces

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<sup>31</sup> *Id.*

<sup>32</sup> *ICSID*, *supra* note 4, at 202.

<sup>33</sup> *Id.* (“This convention shall apply to all territories for whose international relations a Contracting State is responsible, except those which are excluded by such State by written notice to the depositary of this Convention either at the time of ratification, acceptance or approval or subsequently.”)

<sup>34</sup> Canada. Parliament. House of Commons. Standing Committee on Foreign Affairs and International Development. *Evidence*. (November 22, 2007), 39<sup>th</sup> Parliament, 2<sup>nd</sup> Session, *available at* <http://www.parl.gc.ca/HousePublications/Publication.aspx?DocId=3133571&Mode=1&Parl=39&Ses=2&Language=E#Int-2214104>. During the time when the federal implementation legislation was being considered, then Senior General Counsel and Director General of Canada’s Trade Law Bureau, Meg Kinnear, now Secretary General of ICSID, testified before the Parliamentary Committee that: “What the federal government has said to all the provinces is that if you want to be what’s called “designated” as a constituent subdivision, just tell us and we will do that . . . . So we have said that this is up to you, and if at any time later you decide that you would like to be designated, just tell the federal government. There is no problem with that, but it’s totally up to the province to decide when they would like to do that.” Provinces that have yet to pass supporting legislation include Alberta, Manitoba, New Brunswick, Nova Scotia, Prince Edward Island and Quebec, and with the Yukon the only territory.)

<sup>35</sup> *See generally* comments of Mrs. Vivian Barbot, MP, *supra* note 29.

and territories, Canada may be violating its treaty obligations under the *Vienna Convention on the Law of Treaties* (*Vienna Convention*).<sup>36</sup> Article 26 of the *Vienna Convention* states that “[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith,”<sup>37</sup> and Article 27 states that “a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.”<sup>38</sup> On the international stage, Canada alone is responsible for the actions of its constituent subdivisions and would not be able to preclude its responsibility for an internationally wrongful act committed by a province or territory that has not passed implementing legislation.<sup>39</sup> Nonetheless, as noted above, Article 70 of the *ICSID Convention* seems to allow for such an arrangement so that ratification on a constituent subdivision basis would not violate the *Vienna Convention*.

Lastly, moving forward with the ratification process without full provincial and territorial concurrency could have political implications in Canada as a deviation from Canada’s ordinary treaty implementation practice. Few would disagree that unanimous provincial and territorial ratification is preferable in Canada’s federal state environment. Moreover, partial applicability of ICSID in Canada could complicate investment transactions and distort economic relations among provinces and territories.

In the absence of unanimity after an unduly prolonged time and considerable effort, the alternative of ratifying the *ICSID Convention* under the “constituent subdivisions” approach may be the best achievable option. It might also “put feet to the fire” in the foot-dragging provinces and territories. Given the history described above, and the benefits that likely would come from ICSID membership, proceeding by this approach may be in the best interests of the Canadian economy and Canadian businesses that invest internationally.

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<sup>36</sup> Vienna Convention on the Law of Treaties, 23 May 1969, 1155 U.N.T.S. 331, 8 I.L.M. 679 [hereinafter *Vienna Convention*].

<sup>37</sup> *Id.* at 339, 8 I.L.M. at 690.

<sup>38</sup> *Id.*

<sup>39</sup> See BARNETT, *supra* note 19 and *infra* note 60 and accompanying text.

*D. EXAMPLES WHERE ACCESS TO ICSID ARBITRATION MIGHT BE  
RELEVANT*

Recently, there have been instances in which Canadian investors may have benefitted in having access to arbitration under *ICSID Convention*.

*First Quantum Minerals v. Democratic Republic of Congo*

First Quantum Minerals Ltd. (First Quantum)'s dispute with the Republic of Congo (DRC) is one of the most publicized examples of a Canadian company investing in a foreign country that could have benefitted from Canada's membership to ICSID. In 1997, First Quantum, agreed to invest US \$553 million in a copper mining project in the DRC.<sup>40</sup> In exchange, First Quantum got the rights to build and operate the mine for at least twenty-two years.<sup>41</sup> However, after First Quantum had put into place eighty percent of the mining infrastructure, the DRC government seized the mine and declared the contract cancelled.<sup>42</sup>

Canada does not have a FIPA with the DRC, however, the DRC is a member of ICSID and provides for ICSID arbitration through its Mining Code.<sup>43</sup> As Canada is not a Contracting State of ICSID, First Quantum could not bring its claim under ICSID. Nonetheless, DRC's Mining Code also provides that nationals whose home state is not an ICSID member can bring a dispute "to any arbitration tribunal of their choice."<sup>44</sup> In February 2010, First Quantum, and its co-investors in the

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<sup>40</sup> Uzma Sulaiman, *Investing in the DRC: Horror or Hope?*, 5 GLOBAL ARB. REV. Iss. 2 (2010), available at <http://www.globalarbitrationreview.com/journal/article/28366/investing-drc-horror-hope>.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> "[D]isputes which might result from the interpretation or application of the provisions of the present Code may be settled, at the request of the party who proceeds first, by arbitration in accordance with the Convention on the Settlement of Disputes Relating to Investments between the State and Nationals of other States, provided that the holder is a "National" of another contracting state according to the terms of Article 25 of said convention." Mining Code, Law No. 007/2002 of July 11, 2002, art 319 ¶ 1, [http://www.miningcongo.cd/codeminier/codeminier\\_eng.pdf](http://www.miningcongo.cd/codeminier/codeminier_eng.pdf).

<sup>44</sup> *Id.* art. 319 ¶ 3. "Holders who are not Nationals of another contracting state may submit disputes resulting from the interpretation or application of the provisions of the present Code to any arbitration tribunal of their choice, but must notify the Government of the name, address and regulations of the

DRC project, the International Finance Corporation and South Africa's Industrial Development Corporation, initiated International Chamber of Commerce (ICC) arbitration in Paris against the DRC.<sup>45</sup>

In August 2010, the DRC withdrew another of First Quantum's mining permits and ordered it to leave.<sup>46</sup> First Quantum asserted that DRC's action was an act of retribution for its commencement of ICC arbitration over its initial project.<sup>47</sup> With regard to this latest dispute, First Quantum has circumvented Canada's failure to ratify the *ICSID Convention* by registering the dispute with ICSID in October 2010 through its Barbadian subsidiary, International Quantum Resources Limited.<sup>48</sup> Barbados has been a party to the ICSID Convention since 1983.<sup>49</sup>

### Canadian Gold Mining Companies in Venezuela

Further examples of Canadian foreign investors that could have used the benefits of the *ICSID Convention* include three gold mining companies with operations in Venezuela. Before President Hugo Chavez nationalized all gold mines in Venezuela in August 2011,<sup>50</sup>

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arbitration tribunal on the date on which the mining title is issued at the Mining Registry.”

<sup>45</sup> SULAIMAN, *supra* note 40; *see also* Andrew de Lotbinière McDougall, *Is the System Working: What Lessons Can Be Learned From A Canadian Trilogy Of Investor Claims (AbitibiBowater, Chemtura, First Quantum Minerals)?*, KLUWER ARB. BLOG, (Sept. 15, 2010), <http://kluerarbitrationblog.com/blog/2010/09/15/is-the-system-working-what-lessons-can-be-learned-from-a-canadian-trilogy-of-investor-claims-abitibibowater-chemtura-first-quantum-minerals/>.

<sup>46</sup> Press Release, First Quantum Minerals Ltd., First Quantum Minerals Announces the Suspension of Operations at its Frontier Mine in the Dem. Rep. Congo (Aug. 27, 2010), <http://www.mining-reporter.com/index.php/component/content/article/348-first-quantum-minerals-ltd/4947-first-quantum-minerals-announces-the-suspension-of-operations-at-its-frontier-mine-in-the-democratic-republic-of-congo>.

<sup>47</sup> *Id.*

<sup>48</sup> *See* ICSID, *List of Pending Cases* at No. 98, ICSID (last updated Sep. 22, 2010), <http://icsid.worldbank.org/ICSID/FrontServlet?requestType=GenCaseDtlsRH&actionVal=ListPending> (listing Int'l Quantum Resources Ltd. v. Democratic Republic of the Congo, ICSID Case No. ARB/10/21, Filed (Oct. 22, 2010)).

<sup>49</sup> *ICSID, List of Contracting States, supra* note 5.

<sup>50</sup> *Hugo Chavez Officially Nationalizes Venezuela's Gold Industry*, HUFFINGTON POST, Aug. 23, 2011, [http://www.huffingtonpost.com/2011/08/24/venezuela-gold-industry-huge-chavez\\_n\\_934968.html](http://www.huffingtonpost.com/2011/08/24/venezuela-gold-industry-huge-chavez_n_934968.html).

three Canadian companies, Vanessa Ventures Ltd. (now Infinito Gold Ltd.), Gold Reserve Inc., and Crystallex International Corporation, had outstanding claims against the country.<sup>51</sup> Although Canada has a FIPA with Venezuela,<sup>52</sup> all three cases are proceeding by way of the ICSID Additional Facility Rules. Under these rules, any award in favor of an investor that the investor attempts to enforce in Venezuela would be subject to review by Venezuelan courts.

### E. NEXT STEPS

Canadian international arbitration and trade law practitioners have long attempted to persuade senior Canadian federal and provincial government officials that it is in Canada's interest to join ICSID. Canada's ratification of the *ICSID Convention* is now regularly raised by Canadian international arbitration and trade law organizations, including through the Canadian Chamber of Commerce and the Canadian Bar Association.<sup>53</sup> The availability of binding ICSID arbitration would increase investor confidence in Canada because it would reduce investor risk and make Canada an even more attractive location for foreign investment. Moreover, Canadians investing in foreign countries would similarly enjoy reduced risks and reduced costs in their foreign investment activities. The majority of countries in which Canadian companies most frequently and most heavily invest are ICSID members (excluding Mexico, India, and Brazil).<sup>54</sup>

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<sup>51</sup> See ICSID, *List of Pending Cases*, *supra* note 5, (listing *Vanessa Ventures Ltd. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/04/6, Filed (Oct. 28, 2004); *Gold Reserve Inc. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/09/1, Filed (Nov. 9, 2009); *Crystallex Int'l Corp. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Filed (Mar. 9, 2011)).

<sup>52</sup> Agreement between the Government of Canada and the Government of the Republic of Venezuela for the Promotion and Protection of Investments, Can.-Venez., Jul. 1, 1996, 2221 UNTS 7, available at <http://treaties.un.org/doc/Publication/UNTS/Volume%202221/v2221.pdf>.

<sup>53</sup> Andrew McDougall & Barry Leon, *Upcoming G20 Meeting in Canada Presents an Opportunity for Canada to Join ICSID*, N. AM. FREE TRADE & INV. REPORT, March 31, 2010, [http://www.perlaw.ca/media/Lawyer\\_Articles\\_PDF/Published\\_BLeon\\_and\\_AMcDougall\\_Upcoming\\_G20\\_Meeting\\_in\\_Canada\\_Presents\\_an\\_Opportunity\\_for\\_Canada\\_to\\_Join\\_ICSID\\_Article\\_Only.pdf](http://www.perlaw.ca/media/Lawyer_Articles_PDF/Published_BLeon_and_AMcDougall_Upcoming_G20_Meeting_in_Canada_Presents_an_Opportunity_for_Canada_to_Join_ICSID_Article_Only.pdf).

<sup>54</sup> See ICSID, *List of Contracting States*, *supra* note 5.

Until the necessary implementing legislation is brought into force throughout the country, or Canada's federal government decides to proceed with ratification without all of the provinces and territories on board, the *ICSID Convention* does not protect Canadian international investors or foreign investors investing in Canada. Thus, Canada is risking significant economic benefits. As one of the two G-8 countries<sup>55</sup> and one of the three OECD members<sup>56</sup> that have not ratified the *ICSID Convention*, Canada seems long overdue to provide foreign investors and Canadians investing internationally with the full protections and benefits that come with ICSID membership.<sup>57</sup>

## II. ITAS AND FEDERALISM: WHO'S LEFT HOLDING THE BILL?

Another issue between the federal government and provinces and territories is who should be liable for the damages awarded against Canada in an ITA arbitration when the actions of a constituent subdivision (a sub-federal entity) constituted the breach of the treaty obligation. This issue came to the fore with Canada's recent settlement with AbitibiBowater Inc. regarding the province of Newfoundland and Labrador's alleged violation of AbitibiBowater's investments rights through an act of its provincial legislature. In April 2009, AbitibiBowater, a forestry company incorporated in the United States, initiated NAFTA Chapter Eleven arbitration for CDN \$500 million claiming that Canada had breached its obligations as a result of Newfoundland and Labrador's Bill 75, entitled *An Act to Return to the Crown Certain Rights Relating to Timber and Water use Vested in Abitibi-Consolidated and to Expropriate Assets and Lands Associated with the Generation of Electricity Enabled by Those Water Use Rights* (Act).<sup>58</sup> The Act essentially served to expropriate most of AbitibiBowater's investments in the province, including its timber and water rights. Only a state party to NAFTA (Canada, United States, or Mexico) can be liable to compensate an investor from another NAFTA party for a breach of Chapter Eleven.<sup>59</sup> One of the key investment

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<sup>55</sup> *Id.* Russia has yet to ratify the Convention although it signed the treaty in 1992.

<sup>56</sup> *Id.* Mexico and Poland have not signed the Convention.

<sup>57</sup> See Barry Leon & Andrew de Lotbinière McDougall, *Why has Canada Not Ratified the ICSID Convention?*, KLUWER ARB. BLOG (August 24, 2010, 9:15 PM), <http://kluwerarbitrationblog.com/blog/2010/08/24/why-has-canada-not-ratified-the-icsid-convention/>.

<sup>58</sup> Abitibi-Consolidated Rights and Assets Act, R.S.N.L. 2008, c. A-1.01.

<sup>59</sup> NAFTA, *supra* note 3.

protection provisions of Chapter Eleven is Article 1110 which prevents a NAFTA party from expropriating the investments of an investor from another NAFTA party without fair compensation.<sup>60</sup>

Canada settled the claim for CDN \$130 million in August 2010, leading to a consent award in December 2010.<sup>61</sup> The settlement was not without controversy as some commentators questioned whether Canada should have settled, and the amount for which it settled.<sup>62</sup> The federal government could have continued on with the arbitration, covered all related costs, and been left with the option of trying to distance itself from an unfavorable award. Instead, the settlement demonstrates that the investment treaty protection system under NAFTA works and that Canada recognizes its importance and, in appropriate circumstances, the need to voluntarily honor the investor protection commitments it has made.

The settlement highlighted a particular challenge of ITAs, such as NAFTA, in federal states like Canada, the United States, and Mexico. As noted, the actions leading to the claim were not ones of Canada's federal government but actions of one of Canada's provinces. However, in accordance with NAFTA, the claim was brought against the federal state which had to defend and ultimately settle the claim. This demonstrates how a state can be financially responsible for its constituent subdivisions and be left to pay for actions that it did not take and had no constitutional or practical authority to prevent.

Following the settlement, Canadian Prime Minister Stephen Harper stated that the federal government did not intend to seek reimbursement from Newfoundland and Labrador, but that in the future, "should provincial actions cause significant legal obligations for the

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<sup>60</sup> *Id.* at art.1110(1), ("No Party may directly or indirectly nationalize or expropriate an investment of an investor of another Party in its territory or take a measure tantamount to nationalization or expropriation of such an investment ("expropriation"), except: (a) for a public purpose; (b) on a non-discriminatory basis; (c) in accordance with due process of law and Article 1105(1); and (d) on payment of compensation in accordance with paragraphs 2 through 6.")

<sup>61</sup> *AbitibiBowater Inc. v. The Gov't of Canada*, (ICSID) Consent Award, Dec. 15, 2010, [http://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/Abitibi\\_Consent\\_Award\\_Dec\\_15\\_2010.pdf](http://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/Abitibi_Consent_Award_Dec_15_2010.pdf).

<sup>62</sup> Scott Sinclair, *\$130 Million NAFTA Payout Sets Troubling Precedent*, CANADIAN CTR. FOR POLICY ALT. (March 22, 2011), <http://www.policyalternatives.ca/publications/commentary/130-million-nafta-payout-sets-troubling-precedent>.



government of Canada, the government of Canada will create a mechanism so that it can reclaim monies lost through international trade processes.”<sup>63</sup>

There has been no clarification of what that mechanism would be or whether it would be imposed unilaterally. Nonetheless, financial arrangements between the federal government and provinces and territories are most often cooperatively negotiated.<sup>64</sup> Whatever the arrangement, the federal government may have to move quickly because NAFTA Chapter Eleven complaints<sup>65</sup> continue to be brought as a result of provincial and territorial actions.<sup>66</sup> Many aspects of environmental, human health and property regulation fall under provincial and territorial constitutional jurisdiction and are likely to continue to be a source of future claims.

#### A. NAFTA CASES RELATING TO PROVINCIAL MEASURES

Canada had two new NAFTA notices filed against it in 2011 based on Ontario’s environmental regulations. First, St. Mary’s Cement, a United States corporation, filed a Notice of Intent on May 11, 2011,

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<sup>63</sup> Bertrand Marotte & John Ibbitson, *Provinces on Hook for Future Trade Disputes: Harper*, THE GLOBE & MAIL (August 26, 2010), <http://www.theglobeandmail.com/report-on-business/abitibi-deal-best-available-harper/article1686431/?cmpid=rss1>.

<sup>64</sup> See HOGG, *supra* note 21, at ¶ 6.9.

<sup>65</sup> NAFTA Chapter Eleven complaints are first brought by way of a “Notice of Intent to Submit a Claim to Arbitration” before a claim is formalized under a “Notice of Arbitration.” Some complaints do not progress past the Notice of Intent. Of the six active complaints relating to constituent subdivision measures, the three most recent complaints have yet to progress past their Notice of Intent: John R. Andre (U.S.) v. Gov’t of Canada, Notice of Intent (Mar. 19, 2010); St. Marys VCNA, LLC (U.S.) v. Gov’t of Canada, Notice of Intent (May 13, 2011); and, Mesa Power Group LLC (U.S.) v. Gov’t of Canada, Notice of Intent (July 6, 2011).

<sup>66</sup> Clayton/Bilcon (U.S.) v. Gov’t of Canada, Statement of the Claim (Jan. 30, 2009); John R. Andre (U.S.) v. Gov’t of Canada, Notice of Intent (Mar. 19, 2010); Mobil Investments Inc. and Murphy Oil Corporation v. Gov’t of Canada, ICSID Case No. ARB (AF) 07/4, Request for Arbitration (Nov. 1, 2007); St. Marys VCNA, LLC (U.S.) v. Gov’t of Canada, Notice of Intent (May 13, 2011); Mesa Power Group LLC (U.S.) v. Gov’t of Canada, Notice of Intent (July 6, 2011), and V.G. Gallo (U.S.) v. Gov’t of Canada, Statement of the Claim (June 23, 2008). See Foreign Affairs and International Trade Canada, Cases Filed Against the Government of Canada, <http://www.international.gc.ca/trade-agreements-accords-commerciaux/disp-diff/gov.aspx?lang=en&view=d>.

alleging that the denial of a quarry permit by the Ontario government was discriminatory and motivated by political concerns in breach of NAFTA Chapter Eleven's fair and equitable treatment obligations.<sup>67</sup> Second, Mesa Power served its Notice of Intent on July 6, 2011, complaining that Ontario's *Green Energy Act*<sup>68</sup> resulted in denials of access to the feed-in-tariff (FIT) program for a number of wind power projects in southwestern Ontario owned by the American corporation.<sup>69</sup> Mesa Power Group asserts that changes in regulations for granting access to the electricity grid and awarding wind power contracts led to a decline in the value of its projects under the FIT program and contravened Canada's NAFTA obligations.<sup>70</sup>

These two cases join the list of four other ongoing NAFTA Chapter Eleven complaints against Canada resulting from provincial and territorial measures.<sup>71</sup> It appears that the issue of constituent subdivision responsibility for actions giving rise to ITA claims will need to be dealt with in Canada sooner rather than later. In response to Canada's settlement with AbitibiBowater, one lead editorial in Canada's principal mainstream newspaper has already called for a solution:

[T]he federal government should not simply wait for the next problem of this kind to come up. It should diplomatically, but firmly, make clear to the provinces that it is thinking about specific options. The taxpayers of Canada need some concrete

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<sup>67</sup> See *St. Marys VCNA, LLC v. Gov't of Canada*, Notice of Intent (filed May 13, 2011) available at [http://www.international.gc.ca/trade-agreements-accords-commerciaux/disp-diff/st\\_marys\\_vcna.aspx?lang=eng&view=d](http://www.international.gc.ca/trade-agreements-accords-commerciaux/disp-diff/st_marys_vcna.aspx?lang=eng&view=d).

<sup>68</sup> *Green Energy Act*, S.O. 2009, c. 12, Sch. A (Can. Ont.).

<sup>69</sup> *Mesa Power Group LLC v. Gov't of Canada*, Notice of Intent (filed July 6, 2011) available at <http://www.international.gc.ca/trade-agreements-accords-commerciaux/disp-diff/mesa.aspx?lang=eng&view=d>.

<sup>70</sup> *Id.*

<sup>71</sup> *Clayton/Bilcon v. Canada*, Notice of Intent (filed Feb. 5, 2008) (N.S.); *John R. Andre v. Canada*, Notice of Intent (filed Mar. 19, 2010) (N.W.T.); *Mobil Invs, Inc. and Murphy Oil Corp. v. Canada* Notice of Intent, (filed Aug. 3, 2007) (Nfld. & L.); *V.G. Gallo v. Canada*, Notice of Intent (filed Oct. 12, 2006) (Ont.), available at <http://www.international.gc.ca/trade-agreements-accords-commerciaux/disp-diff/gov.aspx?lang=en&view=d>.

assurance that they will not have to pick up another such tab.<sup>72</sup>

Until the federal government establishes an arrangement with its provinces and territories regarding the costs of ITA claims that are based on the actions of a constituent subdivision, the federal government is left in the position of defending these claims without any assurance that its sub-federal entities will cooperate and help cover the financial costs of settling claims and satisfying awards. Canada's NAFTA partners, the United States and Mexico, both of which are federal states, may also need to consider developing comprehensive solutions to this issue.<sup>73</sup>

### III. HEALTH AND ENVIRONMENTAL PROTECTION REGULATIONS – *CHEMTURA CORP. V. CANADA*

Canada's experience with NAFTA Chapter Eleven arbitration appears to have placed it at the forefront of responding to investor-state claims relating to health and environmental protection regulation. Canada has risen to prominence given its victory in the NAFTA case *Chemtura v. Canada*.<sup>74</sup> Chemtura Corporation, an American agricultural pesticide products manufacturer, alleged that, through its Pest Management Regulatory Agency (PMRA), the government of Canada wrongfully terminated Chemtura's pesticide business in lindane-based products.<sup>75</sup> Chemtura claimed that Canada breached its NAFTA Chapter Eleven obligations through its regulatory actions, in particular Article 1110 (Expropriation) and Article 1105 (Minimum Standard of Treatment/Fair and Equitable Treatment).<sup>76</sup> Not only did

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<sup>72</sup> Editorial, *How Ottawa could avoid getting stuck with the provinces' bills*, GLOBE & MAIL, Aug. 29, 2010, <http://www.theglobeandmail.com/news/opinions/editorials/how-ottawa-could-avoid-getting-stuck-with-the-provinces-bills/article1688337/>.

<sup>73</sup> See also Barry Leon & Andrew McDougall, *Left Holding the Bill: Can the NAFTA Countries Recover from Their Constituent Territories?*, N. AM. FREE TRADE & INV. REP., Vol. 21, No. 1, Jan. 1, 2011, available at <http://www.perlaw.ca/en/newsroom/publications/2011/1/1/left-holding-the-bill-can-the-nafta-countries-recover>; McDougall, *Is the System Working*, *supra* note 45.

<sup>74</sup> *Chemtura Corp. v. Canada*, UNCITRAL (NAFTA), Award, Aug. 2, 2010 [*Chemtura*], available at <http://www.international.gc.ca/trade-agreements-accords-commerciaux/disp-diff/crompton.aspx?lang=en&view=d>.

<sup>75</sup> *Id.* at ¶ 7.

<sup>76</sup> NAFTA, *supra* note 3, art. 1110 & 1105.

the unanimous tribunal reject Chemtura's US \$80.2 million claim, it ordered Chemtura to pay for the costs of the arbitration, including approximately CDN \$3 million towards Canada's legal fees.<sup>77</sup> The arbitral tribunal found that the PMRA "took measures within its mandate, in a non-discriminatory manner, motivated by the increasing awareness of the dangers presented by lindane for human health and the environment."<sup>78</sup> The tribunal held that the "the measure adopted under such circumstances is a valid exercise of [Canada]'s police powers and, as a result, does not constitute [a violation of Canada's NAFTA Chapter Eleven obligations]."<sup>79</sup>

The decision in *Chemtura* is significant in relation to investor claims based on health and environmental protection regulation. The award demonstrates that legitimate measures do not necessarily conflict with a state's ITA obligations.<sup>80</sup> A longstanding criticism of investor-state arbitration is that it affords investors of the host state's ITA partner greater rights than that of its own domestic investors, while at the same time curtailing a state's public policy choices.<sup>81</sup> Arguably, this criticism of the potential chilling effect of investor-state arbitration on public regulations was initially merited given Canada's first experience under NAFTA Chapter Eleven.

### *Ethyl v. Canada*

In *Ethyl v. Canada*, Canada settled a claim by the American chemical producer that its import ban of a gasoline additive, MMT, was contrary to NAFTA's investor protections.<sup>82</sup> A key factor in Canada's decision to settle the case was the lack of scientific evidence available to support the ban.<sup>83</sup> In its Statement of Defence, Canada

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<sup>77</sup> *Id.*

<sup>78</sup> *Id.* at ¶ 266.

<sup>79</sup> *Id.*

<sup>80</sup> See also McDougall, *Is the System Working*, *supra* note 45.

<sup>81</sup> See Howard Mann & Konrad von Moltke, *NAFTA's Chapter 11 and the Environment: Addressing the Impacts of the Investor-State Process on the Environment*, INT'L INST. FOR SUSTAINABLE DEV., at 13-14 (1999) available at <http://www.iisd.org/pdf/nafta.pdf>; see also Rahim Moloo & Justin Jacinto, *Environmental and Health Regulation: Assessing Liability Under Investment Treaties* 29 BERKELEY J. INT'L L. 1. (2011).

<sup>82</sup> *Ethyl Corp. v. Gov't of Canada*, NAFTA/UNCITRAL, Statement of Claim (Oct. 2, 1997), available at <http://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/ethyl3.pdf>.

<sup>83</sup> Moloo & Jacinto, *supra* note 81, at 29.

acknowledged that the effects of low quantities of MMT were unknown. However, Canada argued that its measure was not expropriatory “because it involve[d] the exercise of regulatory power or ‘police’ power” and that “the Act was enacted for the maintenance of health, for the conservation of clean air and for the protection of the environment.”<sup>84</sup> Having lost its jurisdictional argument<sup>85</sup> and three similar challenges under the dispute settlement mechanisms of the *Agreement on Internal Trade*,<sup>86</sup> Canada repealed the ban and paid Ethyl US \$19.3 million.<sup>87</sup>

Critics of the settlement found it disturbing that NAFTA enabled Ethyl to compel a foreign government to lift a ban, something which Ethyl could not have compelled its own domestic government to do.<sup>88</sup> Despite the fact that a state should be able to adopt regulations to protect against potential health and environmental threats, a foreign investor should not bear the risks of the state adopting a measure that is not scientifically supported.<sup>89</sup> The same reasoning also applies where a state tries to cast a measure as a health or environmental regulation in order to justify its imposition, which was Canada’s experience in *S.D. Myers v. Canada*.<sup>90</sup>

#### *S.D. Myers v. Canada*

Canada’s next foray into NAFTA Chapter Eleven arbitration relating to health and environmental protection regulations dealt with its temporary export ban on PCB waste in late 1995. In *S.D. Myers v. Canada*, an American investor claimed that the export ban breached

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<sup>84</sup> Ethyl Corp. v. Gov’t of Canada, NAFTA/UNCITRAL, Statement of Defence ¶ 95 (Nov. 27, 1997), available at <http://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/ethyl4.pdf>.

<sup>85</sup> Ethyl Corp. v. Gov’t of Canada, NAFTA/UNCITRAL, Preliminary Tribunal Award on Jurisdiction (June 24, 1998), available at <http://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/ethyl6.pdf>.

<sup>86</sup> See Agreement on International Trade, Consolidated Version, Canada, July, 1, 1995, available at [http://www.ait-aci.ca/index\\_en/ait.htm](http://www.ait-aci.ca/index_en/ait.htm).

<sup>87</sup> Shawn McCarthy, *Failed Ban Becomes Selling Point for MMT*, THE GLOBE & MAIL, July 21, 1998, at A3.

<sup>88</sup> H. Hammer Hill, *NAFTA and Environmental Protection: The First Ten Years* 6 J.I.J.I.S. 157, 161 (2006).

<sup>89</sup> Moloo & Jacinto, *supra* note 81, at 30.

<sup>90</sup> *S.D. Myers, Inc. v. Govt. of Canada*, NAFTA/UNCITRAL, Partial Award (Nov. 13, 2000), [http://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/myersvcnadapartialaward\\_final\\_13-11-00.pdf](http://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/myersvcnadapartialaward_final_13-11-00.pdf).

Canada's NAFTA obligations.<sup>91</sup> Canada tried to defend its actions citing health and environmental reasons for the adoption of its measure;<sup>92</sup> however, statements made by Canadian officials and government documents indicated that the real objective was to protect domestic interests. The NAFTA tribunal held that "there was no legitimate environmental reason for introducing the ban" as "the documentary record as a whole clearly indicates that the Interim Order and the Final Order [to ban the export of PCB waste] were intended primarily to protect the Canadian PCB disposal industry from U.S. competition."<sup>93</sup> While the tribunal acknowledged that government intent is "complex and multifaceted,"<sup>94</sup> it found that there was enough evidence on the record to indicate Canada's protectionist intent.<sup>95</sup> The tribunal held that Canada breached its national treatment (Article 1102) and fair and equitable treatment (Article 1105) obligations and ordered Canada to pay S.D. Myers just over CDN \$6 million in damages.<sup>96</sup>

*Dow AgroSciences LLC v. Canada*

In March 2009, while *Chemtura* was ongoing, Dow AgroSciences LLC, a United States-based corporation, served a Notice of Arbitration under NAFTA Chapter Eleven seeking US \$2 million in damages for losses stemming from the Government of Quebec's ban on the sale and certain uses of lawn pesticides containing the active ingredient 2,4-D.<sup>97</sup> Dow AgroSciences claimed that Quebec's actions violated its rights to fair and equitable treatment (Article 1105) and was tantamount to expropriation (Article 1110) under NAFTA.<sup>98</sup> Although Quebec claimed that it adopted the measure for health and environmental reasons, the claimant alleged that "there was no evidence that 2,4-D posed a health or safety risk to humans,"<sup>99</sup> that Quebec was aware of

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<sup>91</sup> *Id.*

<sup>92</sup> *Id.* at ¶ 152.

<sup>93</sup> *Id.* at ¶¶ 194-195.

<sup>94</sup> *Id.* at ¶ 161.

<sup>95</sup> *Id.* at ¶ 162.

<sup>96</sup> S.D. Myers, Inc. v. Govt. of Canada, NAFTA/UNCITRAL, Second Partial Award ¶ 311 (Dec. 21, 2002), <http://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/MyersPA.pdf>.

<sup>97</sup> Dow Agrosciences LLC v. Gov't of Canada, UNCITRAL (NAFTA), Notice of Arbitration, (Mar. 31, 2009), [http://www.international.gc.ca/trade-agreements-accords-commerciaux/disp-diff/agrosciences\\_archive.aspx?lang=en&view=d](http://www.international.gc.ca/trade-agreements-accords-commerciaux/disp-diff/agrosciences_archive.aspx?lang=en&view=d).

<sup>98</sup> *Id.* ¶¶ 47-53.

<sup>99</sup> *Id.* ¶ 20.

this, and that it was motivated by political considerations rather than any legitimate scientific concerns.<sup>100</sup>

Given the similar fact scenario involving the ban of a chemical, the case bore a close resemblance to *Chemtura*. It does not appear to be a coincidence that Dow AgroSciences settled its claim soon after the *Chemtura* award was rendered.<sup>101</sup> The settlement was reached without resort to arbitration. Under the terms of the settlement, Quebec maintained its ban on 2,4-D and Dow AgroSciences did not receive any compensation. Quebec, however, acknowledged the Department of Health Canada's conclusion that products containing 2,4-D do not pose an unacceptable risk to human health or the environment provided that users follow the instructions on the label.<sup>102</sup> Following the settlement, Canada's Minister of International Trade stated that "[t]his agreement with Dow AgroSciences demonstrates that the NAFTA dispute settlement mechanism works," and that the agreement "confirms the right of governments to regulate the use of pesticides [which] will not be compromised by Canada's participation in NAFTA or any other trade agreement."<sup>103</sup>

The result in *Dow AgroSciences* and the decision in *Chemtura* demonstrate that states are able to make legitimate policy decisions based on sound scientific evidence and, at the same time, comply with their obligations in ITAs. Experience has also shown that political motivations masked as public policy concerns will not stand the scrutiny of investor-state tribunals.

#### IV. CONCLUSION

Canada has been, and likely will continue to be, a dynamic participant in international investment arbitration. While Canadian foreign investors are increasingly active internationally and Canada continues to be an attractive venue for foreign investment, Canada's

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<sup>100</sup> *Id.* ¶ 25.

<sup>101</sup> *Dow Agrosciences LLC v. Her Majesty the Queen in Right of Canada*, UNCITRAL (NAFTA), Settlement Agreement (May 25, 2011), [http://www.international.gc.ca/trade-agreements-accords-commerciaux/disp-diff/agrosciences\\_archive.aspx?lang=en&view=d](http://www.international.gc.ca/trade-agreements-accords-commerciaux/disp-diff/agrosciences_archive.aspx?lang=en&view=d).

<sup>102</sup> *Id.*

<sup>103</sup> Press Release, Foreign Affairs & Int'l Trade Canada, Canada Welcomes Agreement with Dow AgroSciences (May 27, 2011), [http://www.international.gc.ca/media\\_commerce/comm/news-communiques/2011/145.aspx?view=d](http://www.international.gc.ca/media_commerce/comm/news-communiques/2011/145.aspx?view=d).

ratification of the *ICSID Convention* would only further complement both fronts. There are some encouraging signs as Canada's business and legal communities are drawing greater attention to Canada's failure to ratify the *ICSID Convention*.

Canada's federal structure plays an important part in its situation regarding ICSID, just as it plays an important part in its inability to hold its constituent subdivisions accountable for their breaches of Canada's ITA obligations. However, the knife cuts both ways. Critics argue that Canada's federal government should not use its treaty-making power to impose broad foreign investor rights that constrain the ability of provincial and territorial governments to legislate and regulate on behalf of their citizens in areas of exclusive provincial and territorial jurisdiction.<sup>104</sup> One commentator has gone so far as to say that "[w]e are witnessing a constitutional train wreck in slow motion."<sup>105</sup>

Whether this train wreck will ever happen remains to be seen. Canada's experience with ITA claims relating to health and environmental protection measures offer hope that it can be avoided. Canada's experience shows that provincial, territorial and federal public policy measures can align with Canada's ITA obligations. In moving forward, Canada can remain confident that the dispute settlement mechanisms in its investment treaties can and do work.

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<sup>104</sup> SINCLAIR, *supra* note 62.

<sup>105</sup> *Id.*



